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Appearing Pro Hac Vice

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	**Chapter 11**
BLOCKBUSTER, INC., *et al.*,	**Case No.: 10-14997 (BRL)**
Debtors.	**(Jointly Administered)**

LYME REGIS PARTNERS, LLC'S OBJECTION TO THE AUTHORIZATION TO EMPLOY AND RETAIN WEIL, GOTSHAL & MANGES LLP

TO THE HONORABLE UNITED STATES BANKRUPTCY JUDGE AND TO DEBTORS AND THEIR ATTORNEYS OF RECORD HEREIN:

Creditor LYME REGIS PARTNERS, LLC ("Lyme Regis" and/or "Creditor"), by and through undersigned counsel, respectfully submits the following Objection to the requested Authorization to Employ Weil, Gotshal & Manges LLP ("WG&M" and/or "Debtor's Counsel"), pursuant to 11 U.S.C. § 327. This Objection is made on the ground that Debtor's Counsel is not disinterested within the meaning of 11 U.S.C. § 101(14).

This Objection is based upon the Debtors' Application Pursuant to 11 U.S.C. §§ 327(a) and 328(a) of the Bankruptcy Code and Federal R. Bankr. P. 2014(a) and 2016, for Authorization to Employ and Retain Weil, Gotshal & Manges LLP [Docket No. 22, Filed 9/23/2010] ("Authorization to Employ"), along with the supporting Affidavit of Stephen Karotkin ("Karotkin Affidavit"), and the Disclosure Statement of Weil, Gotshal & Manges LLP.

Lyme Regis Partners, LLC requests that the Court grant the relief requested herein.

Respectfully Submitted,

Date: October 12, 2010

THE MCMILLAN LAW FIRM, APC

/s/ Scott A. McMillan

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Attorney for Creditor,
Lyme Regis Partners, LLC

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I. INTRODUCTION

On September 23, 2010, Debtors Blockbuster Inc., *et al.*, ("Blockbuster" and/or "Debtors") submitted their Chapter 11 petitions in bankruptcy and application for authorization to employ Weil, Gotshal & Manges LLP ("WG&M"). An affidavit of Stephen Karotkin, a member of WG&M, was attached to the Application ("Karotkin Affidavit"), which purported to disclose potential conflicts of interest WG&M might have as Counsel to the Debtors. Lyme Regis Partners, LLC ("Lyme Regis" and/or "Creditor") objects to the retention of WG&M because it is not "disinterested," and was not entirely candid in its disclosures as it wilfully failed to disclose all connections which might render WG&M not disinterested within the meaning of 11 U.S.C. § 327(a) and 11 U.S.C. § 101(14).

First, this Court should find that WG&M is not disinterested within the meaning of 11 U.S.C. 327(a) and 11 U.S.C. 101(14), because its representation of other clients will color its independence and impartiality.

Second, this Court should disqualify WG&M as Counsel to the Debtors as a result of their lack of disinterestedness.

Third, this Court should disallow fees previously awarded to WG&M, upon a finding that WG&M wilfully neglected to disclose all of its actual or potential conflicts of interest. Indeed, WG&M has demonstrated its bias at the outset of this case, in filing a

motion to have the movie studios that it represents paid in full on pre-petition obligations, to the detriment of other unsecured creditors it does not represent.[1]

II. ARGUMENT

A. Debtors' Counsel, Lacking the Disinterestedness Required by 11 U.S.C. § 101(14) for Appointment, Should be Disqualified Under 11 U.S.C. § 327(a)

11 U.S.C. § 327 requires that any professionals appointed to represent the debtor "not hold or represent an interest adverse to the estate" and that they be "disinterested persons." (11 U.S.C. § 327(a).) A "disinterested person" is one who "does not have an interest materially adverse to the estate . . . by reason of any direct or indirect relationship to . . . the debtor . . . or for any other reason." (11 U.S.C. § 101(14)(e).) This definition

> is sufficiently broad to include any professional with an interest or relationship that would even faintly color the independence and impartial attitude required by the Code.

(*In re Greystone Holdings, L.L.C.,* 305 B.R. 456, 460-461 (N.D. OH 1998), citing *In re Crivello,* 134 F.3d 831 (7th Cir. 1998).)

This Court has the discretion to determine whether a potential conflict is disqualifying for purposes of 11 U.S.C. 327(a). (*Magten v. Paul Hastings,* 346 B.R. 84 (D.DE 2006).) "The term adverse interest is not defined in the Bankruptcy Code. A generally accepted definition of adverse interest is: (1) possession or assertion of an

[1]Lyme Regis Partners, LLC, are also opposing Debtors' motion to allow prepetition payments to the Movie Studios and Game Providers in a separate motion.

economic interest that would tend to lessen the value of the bankruptcy estate; (2) possession or assertion of an economic interest that would create either an actual or potential dispute in which the estate is a rival claimant; or (3) possession of a predisposition under circumstances that create a bias against the estate." (*In re 3dfx Interactive, Inc.*, 2007 Bankr. LEXIS 1941 (Bankr. N.D. Cal. June 1, 2007), citing *In re Roberts*, 46 B.R. 815, 827 (Bankr. D. Utah 1985), aff'd in part, rev'd and remanded in part on other grounds, 75 B.R. 402 (D. Utah 1987); See also, *Dye v. Brown (In re AFI Holding, Inc.)*, 355 B.R. 139 (9th Cir. BAP 2006) [recognizing this definition].)

Further, the affiliation of an attorney whose interests with the debtors make him a not disinterested person under section 101(14), creates a relationship with others affiliated with the firm that requires disqualification of the entire group from representation of the debtors. (*In re Petro-Serve Ltd.,* 97 B.R. 856, 861 (S.D. MS 1989).) Because of the broad spectrum of its other clients, WG&M is not disinterested within the meaning of the law, and thus cannot represent the Debtors in this action.

i. WG&M Is Not Disinterested Because of Its Representation of Movie Studios

WG&M maintains that all of the dual representations listed in Karotkin's Affidavit are "unrelated" to the present matter. However, Debtors' Motion for leave to pay the pre-petition claims of movie studios and game providers, filed contemporaneously with the application for employment, raises serious doubts as to this assertion. Many of WG&M's

current clients listed in the disclosures are the very same movie studios that Debtors are seeking, through a motion presented by WG&M, to pay in full for prepetition obligations.

The premature payment of the movie studios and game providers could well impact the interests not only of the other secured creditors but of the Debtors as well. To the extent that the Debtors unnecessarily try to favor WG&M's clients over other creditors with equal claims on their assets (as they are doing in the motion WG&M already filed on Debtors' behalf), Debtors will be impeded from reaching a prompt and equitable resolution of these other claims. The result is likely to be needless litigation that, in the end, will only make the bankruptcy longer and more expensive for Debtors.

In its Disclosure, WG&M fails to distinguish which of the studios it lists are secured and/or unsecured Studios. One example is Sony Home Pictures Entertainment, which according to WG&M's disclosure, is a movie studio that supplies Debtors and a current client to WG&M. Elsewhere, in the Motion for prepetition payment, Sony Pictures Home Entertainment is listed as one of the Major Studios that will benefit if the Motion is granted. (Prepetition motion, Filed September 23, Docket 3, ¶ 22.) This clearly is a conflict of interest, one that more than faintly colors the supposed independence and impartiality of WG&M required by the Code.

ii. WG&M Is Not Disinterested Because of Its Representation of Other Unsecured Creditors

There are at least eight instances in which a current client of WG&M is also listed

as an unsecured creditor of Blockbuster. (See, Karotkin Affidavit, Exhibit 2, pp. 12, 14, 18.) WG&M has not disclosed the nature of the representation of its clients in those other matters, so this Court cannot properly evaluate WG&M's potential conflicts. WG&M merely asks the parties and this Court to take WG&M's word that the representation is "unrelated," which does not satisfy the requirements for demonstrating disinterestedness.

iii. WG&M's Disclosures Do Not Adequately Ensure WG&M Does Not Have Adverse Interests that Would Disqualify Them as Counsel

"The disclosures in Rule 2014 Affidavit must be explicit enough for the court and other parties to gauge whether the person to be employed is not disinterested or holds an adverse interest." (*In re Midway Indus, Contractors, Inc*., 272 B.R. 651, 662 (Bankr. N.D. Ill. 2001).) "The court should not have to 'rummage through files or conduct independent fact finding investigations to determine if the professional is disqualified.'" (*In re Granite Partners*, L.P., 219 B.R. 22, 32-33 (Bankr. S.D. N.Y. 1998), quoting *In re Rusty Jones, Inc*., 134 B.R. 321, 345 (Bankr. N.C. Ill. 1991).)

In *In re Granite*, the affidavit included a disclosure of its connections with a brokerage firm, but not the full extent of the conflict. The affidavit stated that the firm had represented parties in interest in the past on unrelated transactions, and might represent them in future unrelated transactions. (*In re Granite, supra*, at 27.) Consequently, representation was disallowed. (*Id.* at 36-40.)

Similarly, Stephen Karotkin states in paragraph 4:

> "WG&M has in the past represented, currently represents, and may in the future represent entities that are claimants or interest holders of the Debtors in matters unrelated to the Chapter 11 case." (Docket No. 22, Filed 9/23/2010.)

WG&M's disclosures do not meet the standard as they employ the type of boilerplate language that courts disfavor. The disclosures must be explicit so this Court can make an adequate determination whether WG&M is in fact disinterested.

Furthermore, it is impossible to ascertain whether WG&M is truly disinterested because of the sheer number of connections listed in the Affidavit. WG&M currently represents approximately 367[2] clients who have or may have an interest adverse to Debtors Blockbuster in the instant bankruptcy action. (See, Karotkin Affidavit, Exhibit 2.) Although WG&M maintains that these clients are represented in matters "unrelated" to this bankruptcy action, the number of clients is far too numerous to ensure there is no conflict of interest. There may well be a direct adverse interest in one of these numerous current clients that will arise during this bankruptcy action, but that the Court cannot perceive at this stage. At a minimum, there exists an indirect relationship to Debtors through the representation of these 367 clients. Such indirect relationships are enough to color the impartial and disinterested attitude required of WG&M to represent the Debtors in this action.

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[2]This number does not reflect WG&M's 17 former clients who pose a potential conflict, as listed in Stephen Karotkin's affidavit.

iv. WG&M Intentionally Failed To Disclose Its Representation of All Adverse Individuals or Entities, as Well as All Former Clients that May Create a Conflict of Interest.

The Court has the discretion to determine whether a potential conflict is disqualifying for purposes of 11 U.S.C. § 327(a). (*Magten v. Paul Hastings,* 346 B.R. 84 (Dist. Ct. D.DE, 2006).) In order for the court to properly determine the disinterestedness of professionals under 11 U.S.A. § 327(a), such professionals are required to disclose all connections with the debtor, creditors, and any other party in interest under Federal Rule of Bankruptcy Procedure 2014. "No matter how old the connection, no matter how trivial it appears, the professional seeking employment must disclose it." (*In re Jore Corp*, 298 B.R 703, 725 (Bankr. Dist. MO, 2003), quoting *In re EWC, Inc*., 138 B.R. 276. 280-81 (Bankr. W.D OK, 1992) [emphasis added].) Attorneys cannot just pick and choose which connections to disclose, and negligence is no excuse. (*In re Fretter, Inc., et al.,* 219 BR. 769, 776 (Bankr. N.D. OH, 1998), citing *In re National Liquidators, Inc.,* 182 B.R. 186 (S.D. OH 1995).)

The Court is to consider whether the failure to disclose was intentional, and if any evidence exists to support an inference of intent, the Court should not accept the professional's story of confusion, mis-communication, or negligence. Rather, the Court should punish a willful failure to disclose the connections required under Federal Rule of Bankruptcy Procedure 2014 as severely as an attempt to put forth a fraud upon the court.

(*In re Crivello*, 134 F.3d 831, 839 (7th Cir. 1998).)

WG&M wilfully violated Federal Rule of Bankruptcy Procedure 2014 in three distinct ways: (1) it failed to disclose the true nature of its relationship with the Movie Studios in the application for employment; (2) it disclosed former client activity only for the past two years (See, Affidavit, FN #3); and (3) it has deleted all obvious "individuals and entities that were adverse to WG&M's clients in both this matter and the matter references on the Match list." (See, Karotkin Affidavit ¶ 5(e).) These actions by WG&M fail to meet the disclosure rules, and should be deemed willful failures.

B. Because It Is Disqualified for Appointment Under 11 U.S.C. § 327(a), WG&M Should be Ordered to Return Any Fees It Has Received in this Matter

In cases where counsel has been disqualified for want of disinterestedness, disqualified counsel were required to return fees awarded for work performed during the pendency of its appointment. Where fees had been awarded, they were disallowed. (*In re Fretter, supra,* at 541, *In re Petro Serve, supra,* at 867.) Where an actual conflict of interest exists, no more need be shown to support a denial of compensation; failure to disclose those facts giving rise to a conflict of interest is grounds for denial of compensation. (*In re Petro-Serve, supra* at 861, citing *Woods v. City Nat'l Bank,* 312 U.S. 262 (1940).)

WG&M has already collected approximately $4.6 million for professional services

and expenses incurred in connection with representation of debtors. (See, Karotkin Affidavit, ¶ 16.) It currently holds approximable $270,000 of advanced retainer. (*Id*.) As discussed above, WG&M has actual and/or potential conflicts of interests in its representation of the Blockbuster Debtors. WG&M is fully aware of whom it represents, and for what matters. Yet, WG&M intentionally failed to disclose all these connections in its application for employment. Therefore, fee disallowance for WG&M is most appropriate.

III. CONCLUSION

For the reasons stated above, the firm Weil, Gotshal & Manges LLP, should be disqualified as appointed counsel for the Debtors, Blockbuster Inc., *et al*. To the extent that fees have been paid to WG&M, it is, as disqualified counsel, obligated to return all such fees.

Respectfully Submitted,

Date: October 12, 2010

THE MCMILLAN LAW FIRM, APC

/s/ Scott A. McMillan

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Scott A. McMillan
Attorney for Creditor,
Lyme Regis Partners, LLC

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on October 12, 2010, a true and correct copy of the foregoing document was served upon all parties on the attached Master Service List via e-mail or United States first class mail, postage prepaid, as indicated, in accordance with the Federal Rules of Bankruptcy Procedure and by e-mail upon the parties that receive notifications in this case pursuant to the Court's ECF system.

/s/ Scott A. McMillan
Scott A. McMillan

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